November 2, 1998

In the Matter of:	
Henry L. Federico Claimant	
against	Case No.: 1998-LHC-971
Electric Boat Corporation Employer/Self-Insurer	OWCP No.: 1-137077
and	
Director, OWCP, U.S. Department of Labor Party-in-Interest	

Appearances:

Thomas Albin, Esq.
For the Claimant

Peter D. Quay, Esq.
For the Employer

Merle D. Hyman, Esq.
Senior Trial Attorney
For the Director

Before: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act as amended (33 U.S.C. §901, **et seq**.), herein referred to as the "Act." The hearing was held on August 24, 1998 in New London, Connecticut, at which time all parties were given the opportunity to present evidence and oral arguments. Post-hearing briefs were not requested herein. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit and RX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as follows:

Exhibit No.	Item	Filing Date
RX 10	Letter dated September 21, 1998 from Employer's counsel with	09/23/98
RX 11	August 20, 1998 Deposition of Dr. John Giacchetto enclosed	09/23/98

The record was closed on September 23, 1998, as no further documents were filed.

Stipulations and Issues

The parties stipulate (TR 6), and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. Claimant suffered an injury in the course and scope of his employment on April 3, 1996.

4. Claimant gave the Employer timely notice of the injury.

5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.

6. The parties attended an informal conference on June 4, 1997.

7. The applicable average weekly wage is $1,005.99.

8. The Employer voluntarily and without an award has paid Claimant temporary total disability benefits from May 22, 1996 through September 2, 1996 and from November 18, 1996 to date and continuing. (RX 2)

9. The Claimant reached maximum medical improvement on May 5, 1997, based on Dr. Gross' medical record on that date.

10. The Employer concedes that Claimant is entitled to permanent total disability from May 5, 1997 and continuing.

The unresolved issue in this proceeding is:

(1) Whether or not Section 8(f) applies.

Summary of the Evidence

Henry L. Federico (Claimant herein), a sixty-three year old gentleman, began his employment in December 1956 at the Groton, Connecticut shipyard of the Electric Boat Division of the General

Dynamics Corporation (Employer), a maritime facility adjacent to the navigable waters of the Thames River where the Employer builds, repairs and overhauls submarines. Claimant performed the duties of a carpenter apprentice for four years and then became a surveyor. As a surveyor, the Claimant worked as part of a six or seven man team that was responsible for applying principles of surveying to the building of submarines. Claimant's last day of work for the Employer was November 17, 1996, at which time the Claimant testified his right knee bothered him such that he could not do his work and get around the work yard (TR 17) and his treating physician issued him a release from work. Since then, the Claimant has not been able to work.

On April 3, 1996, the Claimant injured his right knee as he was carrying equipment up a ladder. He went to the Yard Hospital and on-duty personnel sent him to Dr. Willetts. Dr. Willetts referred Claimant to Dr. Stephen Gross, who specializes in total knee arthroplasty. On May 22, 1996, Dr. Gross performed a total knee replacement at Westerly Rhode Island Hospital. The Claimant returned to work on September 3, 1996 with restrictions. Claimant, upon performing his surveyor duties, however, experienced further problems with his knee and difficulty performing the functions of his position. The Claimant returned to Dr. Gross, who increased the restrictions. The Claimant presented the restrictions to the Yard Hospital and Dr. Gross took Claimant out of work, initially for a month at a time, and eventually Dr. Gross instructed the Claimant to cease working. (TR 21)

Prior to April 1996, the Claimant had been subject to the permanent work restriction of no more than five hours per day on the boats. (TR 19; RX 7) The restriction had been issued as the result of a July 23, 1990 injury, sustained when the Claimant banged his knee on a steel bulkhead while performing his work on a submarine. (RX 3) Claimant was treated by Dr. Philo F. Willetts, Jr., (RX 5) and was out of work and received compensation benefits from July 30, 1990 through August 5, 1990 as well as a schedule loss for the 22.5% impairment to his right knee (RX 4). When he returned to work, he continued to have problems performing his job.

The Claimant was again examined by Dr. Willetts on April 18, 1996. The Doctor noted that Claimant presented with a complaint that

> ...he was once again on the boats and again injured his right knee. He said that even before this most recent injury on April 3, 1996, he was noticing some increased limping with the right knee and also was noting some angulation.
>
> He said that on April 3, 1996, he was coming up a vertical steel ladder when he struck the front of his right knee on a rung. He said there was pain, and he went to the yard hospital promptly. He was treated with an ice pack and now follows up orthopedically.

> He said there has been some swelling, pain, and stiffness and it is somewhat increased from before April 3, 1996. He denied locking, loose body, or patellar instability.
>
> Examination shows clear varus deformity of the right knee not previously present. This measures 12 degrees, where as the left knee is neutral. This is not a result of the April 3, 1996, incident but appears to be chronic degeneration of the knee over the past one and one-third years since I have seen [Claimant].
>
> ...
>
> [Claimant] was advised that he has probably recently contused his right knee, and this appears to have aggravated his already well established and ongoing condition for which he has been evaluated and also seen as an IME. We both apparently agree that [Claimant] has had a previous injury to the right knee superimposed upon some degenerative arthritis. His condition is work-related and the combination of the preexisting arthritic changes and the work injuries have produced materially and substantially greater findings than would have been produced by either work injury alone.
>
> [Claimant] was also advised that on today's x-rays there is substantial obliteration of the medial joint line and moderately advanced degenerative arthritis medially. He was advised that I believe he will come to a total knee [replacement]. This is not essential right at this time, and is a pain related option which I think he will exercise over the next several months to year or so.
>
> ...

(CX 2)

The Claimant was initially seen by Dr. Stephen B. Gross on April 30, 1996. Upon examination, Dr. Gross noted the Claimant's right knee had a severe varus deformity with a large medial osteophytic ridge and medial joint line pain, range of motion 0 to 105 degrees, varus malalignment mildly correctable, negative Lachman's and negative pivot shift. X-rays revealed severe end stage degenerative arthritis effecting (sic) his medial compartment with absolutely no joint space, and the Doctor assessed Claimant with “end stage DJD right knee.” (CX 3) The Doctor informed the Claimant of his options, and the Claimant decided to proceed with total knee arthroplasty which was performed on May 22, 1996. Progress was noted on examinations of May 31, 1996; June 20, 1996.; and July 22, 1996. After an August 19, 1996 examination, Dr. Gross informed the Claimant that he could return to work on September 2, 1996 with the following restrictions: no ladder climbing, no lifting greater than 20 pounds, and no prolonged bending or stooping. On November 18, 1996, the Claimant informed Dr. Gross

that he felt as though “his result is being compromised by demands placed upon him at work.” (CX 3) Although the Claimant had not done any ladder climbing, he was frequently walking on uneven ground and over obstacles, which resulted in twisting and other types of stress to his knee. The Claimant had observed swelling and a posterior knee discomfort. Dr. Gross, who noted that the Claimant had become quite symptomatic and that this was work-related, held the Claimant out of work for a four week period. Examinations on December 16, 1996; January 13, 1997; and February 10, 1997, resulted in further release from work until the time of Claimant's retirement. On May 5, 1997, the Doctor continued to note improvement to Claimant's right knee, that Claimant had full range of motion, good alignment and no palpable tenderness. Claimant was instructed to return to the Doctor in one year.

In a November 11, 1993 follow-up report, Dr. Willetts, who had treated Claimant for his 1990 knee injury from July 27, 1990 through October 14, 1994, stated that Claimant

> ...returned on November 11, 1993, and stated he felt about the same. He stated that he generally can live with his right knee except when he tried 'to keep up with the young kids' at work. He said that his pains originated when he bumped his right knee on the bulkhead door of a submarine in July, 1990, and had reached a steady state with no change over the last several months.
>
> I had seen him on July 27, 1990, at which time the impression was contusion of the right knee, superimposed upon mild degenerative arthritis. Subsequently, an MRI in February, 1991, had shown discreet osteonecrosis (bone death) over the medial femoral condyle. These changes became evident on plain x-rays shortly thereafter.
>
> Since then, [Claimant] has continued to do his work with some limitation of the time spent on the boats. Apparently, this has been an arrangement that is agreeable to both [Claimant] and his employer.
>
> He now inquires whether there is any impairment regarding his condition.
>
> ...
>
> IMPAIRMENT: Using as a guide The American Medical Association <u>Guides to the Evaluation of Permanent Impairment</u>, Fourth Edition, there is a permanent partial physical impairment determined as follows.
>
> Based upon the varus deformity of the right knee, associated with the osteonecrosis of the medial femoral condyle and the degenerative changes and using Table 41 on page 78 of the AMA Guides, there is a 20% permanent partial physical impairment of the right lower extremity.

> APPORTIONMENT: In my opinion, there was mild preexisting degenerative arthritis which would have progressively increased, regardless of the incident of July, 1990. I believe that the knee contusion with subsequent osteonecrosis of the medial femoral condyle constitutes 12% permanent partial physical impairment of the right lower extremity and the remaining 8% permanent partial physical impairment of the right lower extremity was probably the preexisting mild but progressive degenerative arthritis.
>
> I believe that the preexisting arthritis, combined with the injury sustained July, 1990, produced significantly and materially greater findings than would have been produced by the knee contusion alone.

(RX 5) On October 14, 1994, Dr. Willetts, who had issued to the Claimant disability slips for various periods of time and continuing work restrictions over the course of his treatment, issued Claimant the permanent work restriction of no more than five hours per day on the boats. (RX 5; RX 7)

In a December 15, 1993 report, Dr. William R. Cambridge, of New London County Orthopedic Surgery P.C., stated his impression that

> [Claimant] sustained a blunt trauma to his right knee approximately three and one half years ago. Initial radiographs did not reveal any significant findings other than evidence of mild arthritis. Over a period of three years he appears to have developed a progressive osteonecrosis of the right knee.
>
> It is my opinion that the present restrictions are reasonable. The patient is rapidly becoming a candidate for a total knee replacement. Presently I feel that his injury carries a permanent partial disability of 25%.

(RX 8)

On March 3, 1997, Dr. John J. Giacchetto, orthopaedic surgeon, performed an independent medical examination of the Claimant. In his March 5, 1997 report, the Doctor reviewed an independent medical examination performed by Dr. Cambridge in December 1993, Claimant's medical records from Dr. Gross and Dr. Willetts (RX 11), post-operative x-rays taken in May 1996, elicited the usual social and employment history, and he conducted an examination. He then surmised

> ...Based on review of the available medical records including Dr. Cambridge's independent medical evaluation dated 12/15/93 I would opine that [Claimant] has sustained a post traumatic arthrosis of the right knee. Furthermore I would say that it was the work injury of

> 1990 that was the chief precipitant of this condition. Even at that time there was some pre-existing degenerative arthritis of the knee that was exacerbated by the July 1990 injury. The work injury of April 1996, at most, was a nominal contributing factor to [Claimant's] requiring total knee replacement surgery, in that one could argue that it may have moved up the timing of this eventuality.
>
> At the current time no additional treatment is indicated. He is not fully disabled. He should be capable of light to moderate work activity. He should not be required to bend, squat, kneel or crawl. Ladder climbing should be avoided only as a safety issue. Ladder climbing would not have any significant adverse effect on the implant. Of course any running and jumping activities should be restricted.
>
> [Claimant] has not been involved in any recreational or extra vocational activity which would contribute to this knee condition.
>
> [Claimant] would be expected to reach maximal medical improvement following total knee replacement one year out. For practical purposes he is essentially at that point currently. As a result of the post traumatic arthrosis and the necessitated total knee replacement he carries a 50% loss of the right lower extremity. As indicated above his condition, for the most part, is the result of the July 1990 work injury. Some pre-existing degenerative arthritis has contributed materially and substantially to this condition and any subsequent impairment.

(RX 9) (See Generally RX 11)

In his August 1998 deposition, Dr. Giacchetto affirmed his opinion that the 1996 injury was an aggravating factor in the Claimant's pre-existing post-traumatic arthrosis. (RX 11, at p. 8) The Doctor also stated that, as of the time of his examination of Claimant, the Claimant had reached maximum medical improvement and would have been able to work with restriction to light to moderate work without repetitive bending, squatting, kneeling, or crawling and with an avoidance of ladder climbing.

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from

it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984); **Kelaita**, **supra**. Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing

entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); **Kier**, **supra**. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v. Universal Maritime Serv. Corp.**, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes, supra**; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his right knee injury, resulted from working conditions that existed at the Employer's maritime facility. The Employer has introduced no evidence severing the connection between this harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that this harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966);

Kooley v. Marine Industries Northwest, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

This closed record conclusively establishes that Claimant's maritime employment at the Employer's facility has resulted in his right knee injury, that the Employer had timely notice of that injury, that the Employer paid certain compensation benefits, as stipulated by the parties, and that Claimant timely filed a claim for benefits once a dispute arose between the parties. In fact, the issue is the nature and extent of Claimant's disability, an issue I shall now resolve.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show

that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternative employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of the record, I find and conclude that Claimant has not been able to perform the duties of a surveyor since November 17, 1996, when Dr. Gross told Claimant to stop working, a disability slip which was thereafter extended up until the date of Claimant's retirement. Claimant has, therefore, been totally disabled since November 18, 1996.

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF**

Exchange Service, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

On the basis of the totality of the record, I find and conclude that Claimant has been permanently and totally disabled since May 5, 1997. The parties' stipulation to this effect is supported by the medical evidence of record, specifically, the May 5, 1997 medical report of Dr. Gross wherein the Doctor continued to note improvement to Claimant's right knee, that Claimant had full range of motion, good alignment and no palpable tenderness and instructed Claimant to return to the Doctor in one year. This Judge notes that Dr. Giacchetto expressed his opinion that Claimant would have been expected to reach maximal medical improvement following total knee replacement one year out and that, for practical purposes, the Doctor found the Claimant to be essentially at that point as of the date of his March 3, 1997 examination. (RX 9; RX 11) I find and conclude, however, that Dr. Gross, a specialist in total knee arthroplasty and Claimant's treating physician, was in a better position to determine when, in fact, the Claimant had achieved maximum medical improvement.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), aff'd in pertinent part and rev'd on other grounds sub nom. **Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17

BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), modified on reconsideration, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982.

This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Medical Expenses

An employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

Accordingly, Employer is liable for the reasonable, appropriate and necessary medical expenses incurred by Claimant because of his work-related injury sustained on April 3, 1996, subject to the provisions of Section 7 of the Act.

Section 8(f) of the Act

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **FMC Corporation v. Director, OWCP**, 886 F.2d 118523 BRBS 1 (CRT) (9th Cir. 1989); **Director, OWCP v. Cargill, Inc.**, 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982); **Director, OWCP v. Sun Shipbuilding & Dry Dock Co.**, 600 F.2d 440 (3rd Cir. 1979); **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific Shipyards**, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and Co.**, 10 BRBS 685 (1979); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. **See Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates

an existing disability rather than creating a separate disability unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983); **Kooley v. Marine Industries Northwest**, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-existing condition. Instead, "the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it." **Dillingham Corp. v. Massey**, 505 F.2d 1126, 1228 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-existing condition. **Director v. Universal Terminal & Stevedoring Corp.**, 575 F.2d 452 (3d Cir. 1978); **Berkstresser v. Washington Metropolitan Area Transit Authority**, 22 BRBS 280 (1989), **rev'd and remanded on other grounds sub nom. Director v. Berstresser, 921 F.2d 306 (D.C. Cir. 1990)**; **Reiche v. Tracor Marine, Inc.**, 16 BRBS 272, 276 (1984); **Harris v. Lambert's Point Docks, Inc.**, 15 BRBS 33 (1982), **aff'd**, 718 F.2d 644 (4th Cir. 1983). **Delinski v. Brandt Airflex Corp.**, 9 BRBS 206 (1978). Moreover, there must be information available which alerts the employer to the existence of a medical condition. **Eymard & Sons Shipyard v. Smith**, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989); **Armstrong v. General Dynamics Corp.**, 22 BRBS 276 (1989); **Berkstresser**, **supra**, at 283; **Villasenor v. Marine Maintenance Industries**, 17 BRBS 99, 103 (1985); **Hitt v. Newport News Shipbuilding and Dry Dock Co.**, 16 BRBS 353 (1984); **Musgrove v. William E. Campbell Company**, 14 BRBS 762 (1982). A disability will be found to be manifest if it is "objectively determinable" from medical records kept by a hospital or treating physician. **Falcone v. General Dynamics Corp.**, 16 BRBS 202, 203 (1984). Prior to the compensable second injury, there must be a medically cognizable physical ailment. **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **Brogden v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 259 (1984); **Falcone**, **supra**.

The pre-existing permanent partial disability need not be economically disabling. **Director, OWCP v. Campbell Industries**, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), **cert. denied**, 459 U.S. 1104 (1983); **Equitable Equipment Company v. Hardy**, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977); **Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2D 602 (3d Cir. 1976).

Section 8(f) relief is not applicable where the permanent total disability is due solely to the second injury. In this regard, **see Director, OWCP (Bergeron) v. General Dynamics Corp.**, 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992); **Luccitelli v. General Dynamics Corp.**, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); **CNA Insurance Company v. Legrow**, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991) In addressing the contribution element of Section 8(f), the United States Court of Appeals for the Second Circuit, in whose jurisdiction the instant case arises, has specifically stated that the employer's burden of establishing that a claimant's subsequent injury alone would not have caused

claimant's permanent total disability is not satisfied merely by showing that the pre-existing condition made the disability worse than it would have been with only the subsequent injury. **See Director, OWCP v. General Dynamics Corp. (Bergeron), supra.**

On the basis of the totality of the record, I find and conclude that the Employer has satisfied these requirements. The record reflects (1) that Claimant has worked for the Employer since 1956 as a carpenter and subsequently as a surveyor, (2) that Claimant experienced a right knee injury on July 23, 1990 (RX 3), (3) that Claimant was out of work and received compensation benefits from July 30, 1990 through August 5, 1990 as well as a schedule loss for the 22.5% impairment to his right knee, as a result of the July 23, 1990 injury, (4) that after his July 23, 1990 injury, Claimant returned to work under work restrictions dated February 15, 1991, which were subsequently adjusted and extended and which eventually led to the permanent restriction of no more than five hours per day on the boats, (5) that Employer retained the Claimant as a valued employee and allowed him to work as a surveyor under these restrictions, (6) that Claimant's February 9, 1991 MRI (RX 6-1) showed degenerative changes in Claimant's right knee, (7) that Dr. Cambridge informed the Claimant on December 15, 1993 that his work was aggravating the right knee chronic degenerative changes and that he would eventually need the right knee arthroplasty, (8) that Claimant sustained a work-related injury on April 3, 1996 which aggravated, accelerated and exacerbated his pre-existing right knee problems resulting in a new injury on that date, (9) that Claimant underwent a total knee arthroplasty, as anticipated by Dr. Cambridge in 1993, on May 22, 1996, (10) that Dr. Cambridge opined that the work-related injury in April of 1996, at most, was a nominal contributing factor to Claimant's requiring total knee replacement surgery, (11) that Dr. Giacchetto opined that as of March, 1997, the Claimant was assigned a 50% loss of the right lower extremity, which assessment was, for the most part, the result of the July 1990 work injury, (12) that Dr. Giacchetto opined that the chronic pre-existing degenerative arthritis has contributed materially and substantially to Claimant's condition and impairment, and (13) that Claimant's permanent total disability is the result of the combination of his pre-existing permanent partial disability and his April 3, 1996 knee injury as such pre-existing disability, in combination with the subsequent work injury, has contributed to a greater degree of permanent disability. **See Atlantic & Gulf Stevedores v. Director**, OWCP, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989).

Claimant's condition, prior to his final injury on April 3, 1996, was the classic condition of a high-risk employee whom a cautious employer would neither have hired nor rehired nor retained in employment due to the increased likelihood that such an employee would sustain another occupational injury. **C & P Telephone Company v. Director, OWCP**, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977), **rev'g in part**, 4 BRBS 23 (1976); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Hallford v. Ingalls Shipbuilding**, 15 BRBS 112

(1982).

This case is distinguishable from the Second Circuit's precedent in **Luccitelli**, **supra**. Claimant Federico worked as a surveyor under permanent work restrictions since at least February 8, 1991 (RX 7). Nevertheless, the Employer retained the Claimant as a valued employee for another five years, until the April 3, 1996 injury. In fact, subsequent to the April 3, 1996 injury, Claimant attempted to return to work and he was able to work from September 3, 1996 through November 17, 1996, on which date he had to stop due to further problems with his knee and difficulty performing the functions of his position.

Even in cases where Section 8(f) is applicable, the Special Fund is not liable for medical benefits. **Barclift v. Newport News Shipbuilding & Dry Dock Co.**, 15 BRBS 418 (1983), **rev'd on other grounds sub nom. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.**, 737 F.2d 1295 (4th Cir. 1984); **Scott v. Rowe Machine Works**, 9 BRBS 198 (1978); **Spencer v. Bethlehem Steel Corp.**, 7 BRBS 675 (1978).

The Board has held that an employer is entitled to interest, payable by the Special Fund, on monies paid in excess of its liability under Section 8(f). **Campbell v. Lykes Brothers Steamship Co., Inc.**, 15 BRBS 380 (1983); **Lewis v. American Marine Corp.**, 13 BRBS 637 (1981).

However, employer's liability is not limited pursuant to Section 8(f) where claimant's disability did not result from the combination or coalescence of a prior injury with a subsequent one. **Two "R" Drilling Co. v. Director, OWCP**, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990); **Duncanson-Harrelson Company v. Director, OWCP and Hed and Hatchett**, 644 F.2d 827 (9th Cir. 1981). Moreover, the employer has the burden of proving that the three requirements of the Act have been satisfied. **Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982). Mere existence of a prior injury does not, **ipso facto**, establish a pre-existing disability for purposes of Section 8(f). **American Shipbuilding v. Director, OWCP**, 865 F.2d 727, 22 BRBS 15 (CRT) (6th Cir. 1989).

As found above, the Employer is entitled to the limiting provisions of Section 8(f).

Attorney's Fee

Claimant's attorney, having successfully prosecuted this claim, is entitled to a fee to be assessed against the Employer. Claimant's attorney has not submitted his fee application. Within thirty (30) days of the receipt of this Decision and Order, he shall submit a fully supported and fully itemized fee application, sending a copy thereof to the Employer's counsel who shall then have fourteen (14) days to comment thereon. A certificate of service shall be affixed to the fee petition and the postmark shall

determine the timeliness of any filing. This Court will consider only those legal services rendered and costs incurred after June 4, 1997, the date of the informal conference. Services performed prior to that date should be submitted to the District Director for her consideration.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. Commencing on May 5, 1997, and continuing thereafter for 104 weeks, the Employer shall pay to the Claimant compensation benefits for his permanent total disability, plus the applicable annual adjustments provided in Section 10 of the Act, based upon an average weekly wage of $1,005.99, such compensation to be computed in accordance with Section 8(a) of the Act.

2. After the cessation of payments by the Employer continuing benefits shall be paid, pursuant to Section 8(f) of the Act, from the Special Fund established in Section 44 of the Act until further Order.

3. The Employer shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his April 3, 1996 injury on and after May 5, 1997.

4. Interest shall be paid by the Employer on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

5. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require even after the expiration of the time period in order provision 1 above, subject to the provisions of Section 7 of the Act.

6. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel, who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after June 4, 1997, the date of the informal conference.

_____

DAVID W. DI NARDI
Administrative Law Judge

Dated:

Boston, Massachusetts

DWD:jw